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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CITY AND COUNTY OF SAN FRANCISCO et al., Plaintiffs and Respondents, v. RETIREMENT BOARD OF THE SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM et al., Defendants and Appellants.	A151518 (San Francisco County Super. Ct. No. CPF16515266)

Defendants Retirement Board of the San Francisco Employees' Retirement System (SFERS) and Jay Huish, in his official capacity as executive director of SFERS (collectively, the Board), appeal from the trial court's judgment granting the petition for writ of mandate of plaintiffs City and County of San Francisco and Ben Rosenfield, in his official capacity as controller (collectively, the City), by which the City seeks to prevent the Board from paying supplemental cost-of-living adjustments (supplemental COLA) to certain pensioners. The City contends that the trial court properly followed the holding of a prior case from this district, *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619 (*Protect Our Benefits*), and the Board is without authority to contravene the limitations imposed on the payment of supplemental benefits to these retirees under a voter-approved ballot initiate. We agree and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. San Francisco's Public Pension Plan

The background to this case was comprehensively detailed by the appellate court in *Protect Our Benefits* and we revisit only as much as is necessary for the disposition of this appeal.

"The City operates its own retirement system, which is known as [SFERS] and is overseen by the [Board]. SFERS administers a pension plan that pays defined benefits to retired City employees based on their years of service, age of retirement and the highest amount of their compensation for a specified period. [Citation.] The funding for pension benefits comes from three sources: contributions from current City employees, contributions from the City, and investment earnings on assets SFERS holds in trust for retirees (the Fund)." (*Protect Our Benefits, supra,* 235 Cal.App.4th at p. 623.)

"Retired City employees have long been eligible to receive an annual cost of living adjustment to their pension payments based on changes in the consumer price index (the basic COLA), generally of up to 2 percent." (*Protect Our Benefits, supra,* 235 Cal.App.4th at p. 624.) "In the election held on November 5, 1996, City voters adopted . . . an initiative measure amending the City's charter (Charter) to establish a supplemental COLA for City retirees in addition to the basic COLA." (*Protect Our Benefits,* at p. 624.) Under then newly adopted Charter section A8.526-1, the supplemental COLA would be added to a retiree's pension payment when the retirement fund earnings exceeded the " 'expected earnings on the actuarial value of the assets' "—meaning, earnings in excess of the expected return on assets held by the fund using actuarial methods and assumptions. (*Protect Our Benefits,* at p. 624.)[1] When funds in

[1] *Protect Our Benefits* explained: "As part of its administration of the Fund, the [Board] retains an independent actuary to produce an actuarial valuation for the Fund each year. The actuarial valuation method used for the Fund includes a 'five-year smoothing' technique in which gains or losses in asset values are spread out over a five-year period, thus dampening the volatility of the valuation of the Fund's assets. The

the reserve account were not sufficient to pay the supplemental COLA, pensions would revert to the level they would have been had a supplemental COLA not existed. (*Ibid*.) On March 5, 2002, the voters passed a ballot initiative making the supplemental COLA permanent such that once the benefit was added to a retiree's pension payment, it could not be reduced. On June 3, 2008, City voters again amended these provisions by adding section A8.526-3 to the Charter, which increased the amount of the supplemental COLA from 3 percent to 3.5 percent and reaffirmed that, once paid, the supplemental benefits could not be reduced. (*Protect Our Benefits*, at p. 625.) If excess earnings were insufficient to pay the full 3.5 percent supplemental COLA in a particular year, " 'then to the extent of excess earning, said allowances shall be increased in increments of one-half percent (.5%) up to the maximum" of 3.5 percent. (*Ibid*.) As before, excess earnings were calculated using an actuarial value of the assets held by the Fund. (*Ibid.*)

The financial crisis of 2008 (the Great Recession) greatly reduced the value of the retirement Fund. In fiscal year 2008–2009, the Fund was no longer fully funded, meaning it no longer contained assets sufficient to cover its actuarial liabilities. The impact on the Fund, however, differed depending on the type of valuation method used. "Measured by the actuarial value of its assets, the Fund fell from 104 percent funded as of July 1, 2008, to only 97 percent funded as of July 1, 2009. Measured by the market value of its assets, the Fund went from 103 percent funded . . . to 72 percent funded as of July 1, 2009." (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 626.)

In the election held on November 8, 2011, City voters adopted Proposition C, making extensive changes to the financing and scope of pension and retiree health care

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actuary also calculates the 'funding ratio,' that is, the ratio of the Fund's assets to its actuarial liabilities. When the Fund's assets exceed its actuarial liabilities, it is said to be 'fully funded.' The valuation of the Fund and its funding ratio can also be calculated on a 'market' basis, which measures the fair market value of the Fund's assets if the entire portfolio were to be liquidated as of a certain date, and compares that valuation to the Fund's actuarial liabilities." (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at pp. 623–624, fn. omitted.)

benefits for City employees in light of the economic downturn. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 626; see discussion *post*.) Of relevance to the present appeal, Proposition C amended Charter section A8.526-3 (section A8.526-3) as follows: " 'To clarify the intent of the voters when originally enacting this Section in 2008, beginning on July 1, 2012 and July 1 of each succeeding year, no supplemental cost of living benefit adjustment shall be payable unless the Retirement System was also fully funded based on the market value of [its] assets for the previous year.' " (*Protect Our Benefits*, at p. 626; see Charter § A8.526-3(d) (section A8.526-3(d)), as amended Nov. 8, 2011.)

Shortly after the election, Protect Our Benefits (POB), a political action committee representing the interests of retired City employees, filed a petition for writ of mandate claiming that the "fully funded" requirement in section A8.526-3(d) unconstitutionally impaired retirees' vested contractual right to the supplemental COLA benefit. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at pp. 622, 626–627.) The lower court found no constitutional impairment as to any retiree, but held in the alternative that "even if subsection (d) impermissibly impaired the vested rights of City retirees who retired after that 1996 Charter amendment (which this Court has concluded it did not do), subsection (d) would still remain lawful as applied to pre-1996 retirees." The court entered judgment for the City and POB appealed.

II. Protect Our Benefits Appeal

In an opinion filed on March 27, 2015, our colleagues in Division Five reversed the trial court's judgment in part, holding that section A8.526-3(d) could *not* be constitutionally applied to current employees or to those who had retired after the effective date of the 1996 initiative establishing the supplemental COLA because the imposition of a "fully funded" requirement was an impairment of a vested contractual right. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 628.) Notwithstanding the measure's language seeking to "clarify the intent of the voters," the court concluded the

2011 measure rendered a substantive change, not a clarification, in the way supplemental COLA benefits were payable. Nothing in the language of the 1996, 2002, and 2008 voter initiatives or ballot materials indicated voters had intended to require full funding as a precondition to the payment of supplemental COLA benefits. (*Protect Our Benefits*, at p. 632 ["That the Fund might have been fully funded when the supplemental COLA was implemented does not mean the supplemental COLA was contingent on full funding."]; see *id*. at pp. 633–637 [discussing prior initiatives].) The court held that because the full funding requirement deprived post-1996 retirees of a supplemental COLA they would otherwise be entitled to receive, and no comparable benefit had been offered to these affected members, the 2011 amendment impermissibly impaired their vested pension rights. (*Id.* at p. 630 ["Because there might be some years in which the Fund will earn more than projected, but will not be fully funded under a market value measurement, the full funding requirement results in a detriment to pensioners who would otherwise be entitled to receive the supplemental COLA."].)

However, as to City employees who had retired *before* the effective date of the 1996 supplemental COLA initiative, the appellate court concluded these retirees have no vested contractual right to the supplemental COLA and therefore section A8.526-3(d) can be lawfully applied to them.[2] As the court explained, "pre-1996 pensioners had a vested right to the pension benefits that were in effect when they retired, having earned such benefits as an element of compensation, but they had no contractual expectation while in service that they would receive a supplemental cost of living allowance." (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 640; see *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662 ["The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute. [Citation.] A member whose

[2] The parties do not dispute that the Proposition C limitations on payment of supplemental COLA benefits also applies lawfully to new employees hired on or after January 7, 2012. (See Charter § A8.526-4(a), as adopted Nov. 8, 2011.)

employment terminated before enactment of a statute offering additional benefits does not exchange services for the right to the benefits."].) The court affirmed in part, reversed in part, and remanded the matter "with directions to enter a new judgment consistent with this opinion." (*Protect Our Benefits*, at p. 643.)

After the appellate court issued its opinion, POB filed a petition for rehearing in which it argued that (1) the opinion's holding regarding pre-1996 retirees was essentially an "advisory opinion," (2) the court committed an oversight and error in applying the fully funded requirement to pre-1996 retirees, and (3) it was impossible to separate the "fully funded" part of the 2011 amendment from the "clarification" section that the court had found invalid. The court denied the petition for rehearing without comment. The Supreme Court declined POB's petition for review requesting that it "excise the part of the Court of Appeal decision applying the 'fully funded' condition to the Supplemental COLA for pre-1996 retirees."

On remand to the trial court, POB renewed its arguments that the "fully funded" condition could not be applied to pre-1996 retirees and that the appellate court's finding on this point was nothing more than an advisory opinion. The trial court rejected POB's proposed judgment as "directly at odds" with the appellate court's opinion and disposition. On October 26, 2015, the court filed its amended judgment, granting POB's petition for writ of mandate and requests for a permanent injunction and declaratory relief, but only as to all current City employees and those employees who retired after the effective date of the 1996 initiative establishing a supplemental COLA. As to pre-1996 retirees, the court denied the petition. The same day, the court executed its writ of mandate ordering the City to pay retroactive supplemental COLA benefits to post-1996 retirees.

III. The Present Dispute

After judgment was entered, POB was involved in efforts to encourage the Board to grant supplemental COLA to pre-1996 retirees without the "fully funded" condition set

forth in Charter section A8.526-3(d). In a letter dated February 25, 2016, the Board informed POB that it did not have the authority to extend the benefit to these pensioners without such condition.

On July 13, 2016, the Board reversed itself and voted to provide the supplemental COLA to pre-1996 retirees in a "Resolution Implementing First District Court of Appeal Decision Regarding Fully Funded Precondition To Supplemental COLA Under Charter Section A8.526-3(d)" (July 2016 Resolution). The July 2016 Resolution was premised in part on the Board's understanding that the appellate court in *Protect Our Benefits* had ruled that section A8.526-3(d) "*may*" be applied to pre-1996 retirees, not that it "*must*" be applied to them. (Italics added.)

The City opposed the Board's action, arguing that the potential costs of the July 2016 Resolution include an immediate $34 million in retroactive payments to these pre-1996 retirees, a $148 million drop in the value of the retirement fund, and an estimated $100 million in costs going forward for the City. The City asserted that SFERS is currently underfunded and the City and its employees will have to pay higher contribution rates under the July 2016 Resolution.

The City filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the Board, alleging the Board has no authority to pay benefits that are not authorized by the Charter. The City separately sought to enjoin the Board from implementing the July 2016 Resolution and exempting the pre-1996 retirees from section A8.526-3(d). On October 5, 2016, the trial court entered an order granting a preliminary injunction prohibiting the Board from implementing the July 2016 Resolution unless the "fully funded" requirement in section A8.526-3(d) is met, and prohibiting the Board from exempting the pre-1996 retirees from the "fully funded" requirement.

On January 27, 2017, the trial court granted the petition for writ of mandate and found in favor of the City on the declaratory and injunctive relief causes of action. It

reasoned that the "fully funded" requirement of section A8.526-3(d) was essentially a legislative mandate, stating that all "presumptions favor the validity of initiative measures." The court also concluded the appellate court in *Protect Our Benefits* had held that "the full funding condition could constitutionally be applied to pre-1996 retirees, since they had no contractual expectation of a supplemental COLA when they retired and thus their vested contractual rights did not include this benefit." The trial court ruled that the Board did not have the authority to refuse to implement section A8.526-3(d) as construed by the *Protect Our Benefits* court.

On March 9, 2017, the trial court filed its judgment granting the petition for writ of mandate and declaratory and injunctive relief. This appeal followed.

DISCUSSION

I. Standard of Review

We are called upon to resolve two interrelated questions: What was the effect of the appellate court's judgment in *Protect Our Benefits*, and in light of that judicial disposition, did the Board have authority under the Charter to exempt pre-1996 retirees from the "full funding" requirement of section A8.526-3(d)? Both are questions of law subject to our independent review. " 'The interpretation of the effect of a judgment is a question of law within the ambit of the appellate court.' " (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1205). Interpretation of a city charter presents a legal question which we examine independently. (*Pease v. Zapf* (2018) 26 Cal.App.5th 293, 302.)

The Board contends that City voters did not intend for section A8.526-3(d) to be enforced only as to pre-1996 retirees when they passed Proposition C. To the extent we must interpret the voter's intent in enacting the 2011 ballot measure, and where the issue here is presented on undisputed facts and involves a question of statutory interpretation, we exercise our independent judgment and review the matter de novo. (*Bostean v. Los*

Angeles Unified School Dist. (1998) 63 Cal.App.4th 95, 107–108; *U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 674.)

II. The Appellate Court's Judgment Forecloses the Board's Current Appeal

The City argues that *Protect Our Benefits* conclusively determined that Charter section A8.526-3(d) was lawful as to the pre-1996 retirees, ending any Board determination to the contrary. The Board cannot countermand a judicial determination as to the legality of a charter amendment. We agree.

The holding in *Protect Our Benefits* was clear. The requirement in Charter section A8.526-3(d) that the San Francisco retirement system must be fully funded before supplemental COLA is allocated may be lawfully applied to pre-1996 retirees. The appellate court explained why the 2011 ballot measure amendments impaired the vested pension rights of current employees and those who retired after the initial enactment of the supplemental COLA in 1996. The court found no such constitutional impairment for pre-1996 retirees, however, because these pensioners did not have a vested right to a supplemental COLA that did not exist during their terms of employment. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 640.) The court concluded: "The City may, without violating vested contractual rights, apply section A8.526-3(d) to these employees and condition their supplemental COLA benefits on full funding." (*Ibid.*)

The Board argues on appeal that use of the word "may" in the quotation above left open the question whether section A8.526-3(d) *must* be applied to pre-1996 retirees. We are not persuaded. Read in context, "may" follows the court's explanation that the limitations provision of section A8.526-3(d) *cannot* be constitutionally applied to a certain class of employees and retirees, but it *may* be applied to pre-1996 pensioners. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 640.) It did not give the Board license to reinterpret the enforceability of section A8.526-3(d).

The appellate court's judgment further dispels the notion that the enforceability of section A8.526-3(d) as to pre-1996 retirees remained an open question. The court's

disposition "affirmed in part and reversed in part" the judgment of the lower court, remanding the matter with instructions to enter a new judgment consistent with the court's opinion. (*Protect Our Benefits, supra*, 235 Cal.App.4th at p. 643.) What was "affirmed in part" was the lower court's denial of the petition for writ of mandate with respect to pre-1996 retirees, grounded in the court's determination that section A8.526-3(d) "would still remain lawful as applied to pre-1996 retirees." The trial court was not at liberty to disregard this court's partial affirmance and enter a different judgment. (See *People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251–252 ["Upon issuance of the remittitur, the trial court's jurisdiction with regard to the 'remitted action' is limited solely to the making of orders necessary to carry the judgment into effect."]; *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367) [" 'Where a reviewing court reverses a judgment with directions . . . the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court.' "].) The trial court accordingly entered judgment denying the petition with respect to pre-1996 pensioners, making the Charter enforceable as to these retirees.

Indeed, that the appellate court's judgment requires application of section A8.526-3(d) to pre-1996 pensioners was evident by POB's subsequent petitions for rehearing and review, which argued unsuccessfully that it was impossible to separate the "fully funded" restriction from the "clarification" section that had been invalidated, and that the appellate opinion with respect to pre-1996 retirees was an "advisory opinion" and should be excised. Both petitions were denied. Had the appellate opinion truly been silent on whether A8.526-3(d) must be applied to pre-1996 pensioners, the lower court's judgment would not have been affirmed in any respect, and the Court of Appeal would not have rejected the arguments advanced by POB.

In short, the constitutional reach of section A8.526-3(d) was a settled question. Although the Board was not a party to the *Protect Our Benefits* case, it is nevertheless

bound by this court's judicial determination that the "full funding" requirement in section A8.526-3(d) is lawful and applicable to pre-1996 retirees. Article VI, section 1 of the California Constitution provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts . . . ." "[A]gencies not vested by the Constitution with judicial powers may not exercise such powers." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 356.) The trial court properly concluded that *Protect Our Benefits* does not give the Board the discretion to decide whether to enforce or exempt from enforcement the requirements of section A8.526-3(d) as to pre-1996 retirees.

The Board also acted in excess of its authority under the City Charter. The Board contends that under the article XVI, section 17 of the California Constitution, it has " 'plenary authority' " and " 'sole and exclusive fiduciary responsibility over the . . . administration of the retirement system,' " along with the " 'responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.' " However, the Board concedes it must act in a manner " 'consistent with this Charter and ordinances.' " (Charter, § 12.100.) The provisions of a city charter "have the force and effect of legislative enactments." (Cal. Const., art. XI, § 3(a).)

Section A8.526-3(d), as interpreted by *Protect Our Benefits*, imposes lawful constraints on the allocation of supplemental COLA benefits to pre-1996 retirees, and conditions such payments on a "fully funded" retirement system. By exempting the pre-1996 retirees from the "fully funded" requirement and bestowing benefits in an unrestricted manner, the Board contravened this legislative mandate and effectively granted pension benefits it was not authorized to give. (See *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 80 ["It is not within [a retirement board's] authority to expand pension benefits beyond those afforded by the authorizing legislation. This is because the granting of retirement benefits is a

power resting exclusively with the City. The scope of the board's power as to benefits is limited to administering the benefits set by the City."].)

We conclude the Board was not authorized under the Charter to exempt pre-1996 retirees from the "fully funded" requirement of section A8.526-3(d) following the appellate court's determination in *Protect Our Benefits* that such restrictions may be lawfully applied to these pensioners. Given the clarity of the appellate court's prior judgment, we need not address the voter's intent in passing charter amendments in 2011 under Proposition C. The Board urges us to do so, however, arguing that the voters never intended for the "fully funded" limitation to be selectively enforced for only certain retirees. It is true the Court of Appeal was not asked to decide whether voters would have intended to apply the "fully funded" requirement solely to pre-1996 retirees, nor did the court address the severability provisions of Proposition C.[3] An examination of the voter's intent, however, does not alter our analysis.

III. Proposition C Voters Intended to Limit Pension Benefits, Lower Costs, and Address the Solvency of the Pension and Retiree Health Care Systems

In construing a provision adopted by voter initiative, our task is to ascertain the intent of the voters. (*International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224.) "We look first to the words themselves, which should be given the meaning they bear in ordinary use." (*Ibid.*) When statutory language is susceptible of more than one reasonable interpretation, courts

[3] Nor in its opening brief on appeal in this case did the Board make a "nonseverability" argument. Rather, in its opening brief, the Board argued the appellate opinion in the prior case did not explicitly state that Proposition C applies to pre-1996 retirees, leaving the measure "ambiguous" in this regard, and the Board could, and did, resolve this "ambiguity" in favor of nonapplicability. It was not until after the City, in its respondent's brief, pointed out Proposition C has a severability clause, that the Board, in its reply brief, first advanced its assertion that the severability clause must be ignored for multiple reasons, including the Board's view that the voters never intended partial implementation of the measure.

may rely on extrinsic materials, "including the ostensible objects to be achieved, the evils to be remedied, the legislative history including ballot pamphlets, public policy, contemporaneous administrative construction and the overall statutory scheme." (*Id.* at p. 225.) Analyses and arguments in official ballot pamphlets circulated prior to the elections may be used to resolve any ambiguity in the language of propositions adopted. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250.) Such extrinsic aids, however, may not be used to "rewrite a statute to conform to an assumed intention which does not appear from its language." (*International Federation*, at p. 225.)

Preliminarily, we observe that the Court of Appeal's decision in *Protect Our Benefits* was not silent on the matter of voter intent in 2011. In response to POB's argument that San Francisco voters had increased City pensions several times since 1950 and would not have intended to reduce benefits for current pensioners, the Court of Appeal responded: "While voters have indeed approved pension increases for retirees in the past, *in 2011 they obviously intended to place a limit on the supplemental COLA*." (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 640, italics added.) The court concluded the 2011 amendments did not simply "clarify" existing law but instead made substantive alterations to the way supplemental COLA is allocated. (*Id.* at p. 632.) The inescapable conclusion is that the voters intended to impose these constraints on *all* members of SFERS, even if that intention resulted in unconstitutional overreach.

We begin with the plain language of section A8.526-3(d). As amended by Proposition C, it stated: "To clarify the intent of the voters when originally enacting this Section in 2008, beginning on July 1, 2012 and July 1 of each succeeding year, *no supplemental cost of living benefit adjustment shall be payable unless the Retirement System was also fully funded based on the market value of the assets for the previous year*." (Section A8.526-3(d), as amended Nov. 8, 2011, italics added.) It is clear the voters intended to place limits on the payment of supplemental COLA for all retirees by

requiring that the retirement system be "fully funded" as a precondition to such payments.

The amendments restricting supplemental COLA benefits were part of a "comprehensive [set of] structural changes to retirement benefits and the retiree health benefits," designed "to improve efficiency and reduce costs and preserve the fiscal soundness of these systems." (S.F. Voter Information Pamp. (Nov. 8, 2011) p. 111.) The "Findings and Purpose" section of the 2011 ballot measure explained that as a result of the Great Recession, the City had suffered a significant decline in its tax and fee revenues and a drop in the value of the retirement fund, from being fully funded to being only partially funded. (*Ibid.*) "[T]o make up the shortfall in the retirement fund, the City has had to increase substantially its employer contributions, further exacerbating the City's deficit." (*Ibid*.) The City's contribution rate to the Retirement System went from 0 percent before the market downturn to 18 percent of payroll in fiscal year 2011-2012, and the City's contribution rate for employee health care costs rose to 13 percent of payroll in fiscal year 2010-2011 and to 6 percent of payroll for retiree health care costs. (*Id.* at pp. 111–112.) Voters were told: "Altogether, these projected increases amount to between $300 million and $600 million annually in current dollars." (*Id.* at p. 112.) According to the ballot digest and the controller's statement, Proposition C would achieve $1.3 billion in savings to the City over a 10-year period by "limit[ing] cost-of-living adjustments for SFERS retirees," "reduc[ing] pension benefits for future City employees [hired on or after January 7, 2012]," "requir[ing] all employees to contribute toward their retiree health care," and increasing certain employee contributions to the pension system based on a sliding wage scale. (*Id*. at pp. 55–57.) The overarching goal of Proposition C, as expressed by its proponents, was to implement a "comprehensive plan that will fix the City's broken pension and health benefit system and save[] taxpayers $1.3 billion over ten years." (*Id.* at p. 58, Proponent's Argument in Favor of Proposition C.)

The Board does not dispute that the voters intended to place a limit on supplemental COLA, but argues that the ballot measure did not contemplate "two tiers of retirees so as to materially disadvantage only one." It contends there is no evidence of any intent by City voters in 2011 to create two classes of retirees such that payment limitations would be imposed on only the oldest retirees. Rather, Proposition C was presented to the voters as a "consensus plan that ensures all city employees share the burden in bad economic times and enjoy the benefits in good times." (S.F. Voter Information Pamp. (Nov. 8, 2011) Proponent's Argument in Favor of Proposition C, p. 58).

While we agree with the Board that Proposition C was presented as a consensus plan developed with input from affected city employees and business and community leaders, we disagree that equal treatment was its overriding purpose. On the contrary, Proposition C expressly mandated differential treatment by lowering pension benefits, raising retirement ages, and imposing other restrictions on newly hired employees. As the legislative history makes clear, the central thrust of Proposition C was to reduce costs and preserve the fiscal soundness of the pension and retiree health care systems in the aftermath of a staggering economic downturn. With respect to the supplemental COLA, the ballot measure explained that "the amendments ensure that retiree supplemental cost of living adjustments will reflect the financial health of the retirement fund, so that the Retirement System pays them only when the retirement fund is fully funded." (S.F. Voter Information Pamp. (Nov. 8, 2011) Proposition C, Findings & Purpose, at p. 112.) City voters were primarily concerned with the sustainability of the pension and retiree health care systems, not with ensuring that all classes of retirees received equal treatment.[4]

[4] In addition, a paid argument against Proposition C noted, in part: "Thousands of current retirees, many whose pensions are $25,000 per year or less, will be negatively impacted by the Cost of Living Adjustment (COLA) payout proposed by this

The Board relies primarily on ballot materials from 1996 and 2008 to argue that voters would not have intended to negatively affect "those who retired more than two decades ago and, thus necessarily, have suffered the greatest impact of inflation on their SFERS benefits." It is questionable whether ballot materials from prior years can shed light on what the voters intended in 2011 when reckoning with the fiscal consequences of the Great Recession.[5] In any event, conditioning supplemental COLA benefits even as to older retirees is entirely consistent with what City voters did, in fact, intend. In passing Proposition C, the voters endorsed—erroneously as it turned out—the view that this condition had *always* been attached to the supplemental COLA. As a result of *Protect Our Benefits,* the City voters' intent could not be lawfully enforced as to post-1996 retirees.

But partial invalidation of the supplemental COLA charter amendment does not mean the voters intended for the entire provision to be nullified. Section A8.526-3 includes a severance provision that states the following: "If any words, phrases, clauses, sentences, subsections, provisions or portions of Section A8.526-3 are held invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining words, phrases, clauses, sentences, subsections, provisions or portions of Section A8.526-3. If any words, phrases, clauses, sentences, subsections, provisions or *portions of Section A8.526-3 are held invalid as applied* to any person, circumstance employee *or category of employee, such invalidity shall not affect* any application of Section A8.526-3 which can be given effect. Section A8.526-3 shall be broadly construed to achieve its stated purposes." (§ A8.526-3(f), italics added.)

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amendment. Retirees won't receive the COLA for years." (S.F. Voter Information Pamp. (Nov. 8, 2011) p. 61.) These arguments suggest voters were aware that retirees with smaller pensions could potentially suffer a detriment if the proposition were passed.

[5] Legislative antecedents not directly presented to the voters are not relevant to a court's interpretation of a ballot initiative. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904–905.)

In *Legislature v. Eu, supra*, 54 Cal.3d 492, the Supreme Court held that although a ballot initiative restricting pensions for incumbent legislators was unconstitutional, its restrictions could be validly applied to nonincumbent legislators under a severance clause in the initiative. (*Id.* at p. 534.) It mattered not that the ballot initiative had not contemplated differential treatment between incumbent and new legislators. Even though the initiative was held "invalid as applied to incumbent legislators, its invalidity does not affect the remaining provisions of the measure, for those provisions can be given effect without regard to the validity or operation of the invalid pension restrictions." (*Ibid.*) We find it analogous to the present appeal.

Case law establishes three criteria for severability: " ' "the invalid provision must be grammatically, functionally, and volitionally separable." ' " (*Legislature v. Eu*, *supra*, 54 Cal.3d at p. 535.) The appellate court in *Protect Our Benefits* impliedly held that the provision was severable in that it held that section A8.526-3(d) could be applied to employees who retired before November 6, 1996. (*Protect Our Benefits*, *supra*, 235 Cal.App.4th at p. 638.) We agree and conclude that the invalid portions of section A8.526-3(d), its "clarification" language and the imposition of a "fully funded" restriction as to post-1996 retirees, may be severed and the remaining provisions of the measure given effect to other retirees.

First, the invalidated "clarification" language may be grammatically severed without affecting the operation of the remaining clauses. The offending clause, "To clarify the intent of the voters when originally enacting this Section in 2008," may be stricken so that section A8.526-3(d) instead reads, "Beginning on July 1, 2012." The resulting language may be construed as applying only to any SFERS members who retired before November 6, 1996, the date when the supplemental COLA was first established. (See *Legislature v. Eu, supra*, 54 Cal.3d at p. 535 [making analogous changes to a ballot initiative].)

Next, the invalid provision is functionally severable. Prohibiting the application of a "fully funded" requirement to post-1996 retirees would not affect imposing the same requirement on pre-1996 retirees and conditioning supplemental COLA benefits on a fully funded retirement system as to these pensioners. With a clear delineation of the two classes of retirees based on the date of retirement, the "fully funded" restriction can operate independently of the invalid provision.

Finally, the invalid portion of the measure is volitionally severable, as evidenced by the inclusion of a severance clause expressly providing that if any portion of section A8.526-3 is held invalid as applied to any "category of employee, such invalidity shall not affect any application of Section A8.526-3 which can be given effect." (Charter § A8.526-3(f).) As discussed *ante*, City voters in 2011 were primarily concerned with lowering pension costs and sustaining the viability of the pension and retiree health care systems, and did not intend to allocate supplemental COLA benefits when the retirement fund was not "fully funded" and could not support such payments. Where a provision includes an express "severability clause," courts presume severability is appropriate. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 270; see *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 332 ["[I]t seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose."].)

The text of section A8.526-3 and the legislative history underlying the passage of Proposition C make clear that the City voters intended to condition eligibility for supplemental COLA benefits on the funding capacity of the retirement system and to give effect to its provisions to the greatest extent possible, notwithstanding differences in the treatment of certain classes of employees and retirees that might result. While we appreciate the Board's advocacy on behalf of SFERS members, the power to take remedial legislative action is reserved by the City's voters.

DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Banke, J.